



Generally Speaking

COMINGS and GOINGS

Please Welcome

AAGs Erin Pohland and **Scott Friend** to the Anchorage Human Services Section. AAG Pohland will be working on third-party subrogation and recovery and AAG Friend will handle the adult protective services work for the Anchorage area.

Cristen Bartus joined the Anchorage Commercial and Fair Business Section as an **Intern**. She is a second year law student from the University of Toledo Law

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School and was selected as a Janet Steiger Fellow sponsored by the American Bar Association, Antitrust Law Section. She will be working with the Consumer Protection Unit.

ADA Jeff O'Bryant, one of the senior ADAs in the Fairbanks DAO and according to DA Mike Gray "one of the best trial attorneys in the division", has retired. He will be greatly missed by all. On a happier note, the offices celebrated with **ADA John "JB" Brainerd** as he heard the good news he had passed the bar exam.

The Anchorage DAO welcomed **ADA Aaron Jabaay**, formerly a municipal prosecutor, into the ranks of the misdemeanor unit. **ADA Kelly Cavanaugh** was also welcomed back to the fold. ADA Cavanaugh worked in Bethel and Anchorage before taking 18 months to explore "civil" practice. He's back and working in the Project Safe Neighborhoods position, a cross-designated position in the U.S. Attorney's Office. DA Adrienne Bachman advises talking to ADA Cavanaugh for serious felon-in-possession cases that might be better prosecuted federally.

The Fairbanks Civil Section feted **Paralegal II Karol Alderman** with a high tea in honor of her retirement after 35 years with the state. Karol's plans for retirement include traveling and gardening.

Many congratulations and best wishes to **LOA Juanita Henry, Kotzebue DAO**, on the May 15 birth of son, Michael Robert.

Davyn Williams joined the Commercial and Fair Business Section as an **AAG** working in the Consumer Protection Unit. She is filling the position formerly held by AAG Cathy Stone before she moved into a position representing the Alaska Housing Finance Corporation. AAG Williams comes to the department from Alaska Legal Services where she handled civil cases in the areas of family law, domestic violence and sexual assault, landlord/tenant, child support, and public

benefits. She graduated *magna cum laude* from UAA in 2002 and graduated from the University of Montana School of Law in 2007. She was born and raised in Bethel, Alaska.

CIVIL DIVISION

Child Protection

New CINA cases based upon allegations in the Office of Children's Services (OCS) petitions:

OCS assumed emergency custody of three children after the Anchorage Police Department responded to a domestic violence call and found the parents highly intoxicated. The mother had fresh injuries on her face and the father is a registered sex offender. The family has an extensive history with OCS.

The Anchorage Police Department received a phone call from a mother who said she wanted OCS to take her baby because she couldn't take care of him. She has a history of drug problems. The father has documented mental illness and his whereabouts were unknown. OCS assumed custody.

OCS worked with a family with three children since January 2008 to address issues of chronic neglect and the father's substance abuse issues. OCS' efforts were unsuccessful and it filed a petition seeking custody of the children. The mother is deceased.

OCS assumed emergency custody of an infant after she was found in the care of her very intoxicated father. The house was filthy. The infant was lethargic, unresponsive, and beer was found in her "sippy" cup. She was taken to the hospital and it was determined she was intoxicated. The mother was not present and has prior history with OCS. The father was arrested and the child was placed with a relative.

OCS assumed emergency custody of a child when he was found outside in the cold with an intoxicated caregiver. The child was not dressed for the weather. Further investigation revealed that the mother has a substance abuse problem and leaves her child with inappropriate caregivers on a regular basis. Several of the caregivers are registered sex offenders. The father's whereabouts are unknown.

OCS received a priority report that an 8-year-old child was being sexually abused by the mother's boyfriend. The mother and boyfriend also have a child together. The mother moved out of the house and was told not to allow contact with the boyfriend due to the sex abuse allegations. After a period of time, the mother moved back in the house with the boyfriend. OCS assumed custody due to the mother's inability to protect the child. The child's father also had past instances of sex abuse, of which the mother was aware. OCS also had previous involvement related to substance abuse.

OCS assumed emergency custody of two children after it was alleged that the daughter had been sexually abused by a family friend. The parents knew the family friend was a registered sex offender for sex abuse of a minor in Texas, but did not protect the children from contact with him. The family has prior OCS history involving domestic violence and substance abuse. The mother had recently started drinking again.

OCS assumed emergency custody of five children when their father was arrested for probation violations. When OCS entered the house it was in significant disarray, with rotting food on the floor, standing dirty water in the tub, and a toilet that had not been flushed in some time. An examination of the children revealed they had not bathed for days and the baby had fungus growing under his fingernails. The children, whose mother is incarcerated, had previously been in the state's custody.

Numerous other children across the state were taken into custody as a result of serious risk of harm due to their parents' substance abuse, domestic violence and/or incarceration.

Activities

AAG John Ptacin attended the Rocky Mountain Child Advocacy Training Institute for training on trial advocacy on May 19–23 in Colorado. ADA Ptacin reports the conference was very helpful in furthering the improvement of his trial skills. AAGs Hanna Sebold and Jan Rutherford provided a full day's training to members of the client agency in Juneau. Several attorneys attended the Alaska Bar Convention.

Commercial and Fair Business

Disciplinary Hearing Concludes Against Land Surveyor

A disciplinary hearing was held May 5–8 in Anchorage against Kenai land surveyor Clifford Baker. The accusation filed by the Division of Corporations, Business and Professional Licensing ("Division") alleges that Baker committed gross negligence, incompetence or misconduct with regard to a survey he prepared in Larsen Bay as part of an arbitrated boundary dispute between two adjoining landowners. The Bureau of Land Management (BLM) had conducted the original survey of the Larsen Bay town site in 1969. By federal law, the boundaries as established by original government surveys are "unchangeable" and must control future disputes.

Additionally, the original monuments are considered the best evidence of the lines and corners made by the government survey, even if, as was the case herein, those monuments do not correspond with the plat and field notes of the survey. The division alleges that Baker's survey (known as a retracement survey) was not in conformity with accepted land surveying standards because he failed to find two of the

three original BLM monuments that the competing surveyor found just a few months before, failed to determine by extrinsic evidence the location of the BLM monuments he couldn't find, and failed to rely on the one BLM monument he did find. A decision by the administrative law judge is expected in the next few months. AAG Robert Auth represented the division at the hearing and throughout this proceeding.

Human Services

Litigation Update

Curyung. The team continues to work on discovery issues and provided supplemental responses to the first and second discovery requests on May 21. The section is also preparing for a settlement conference in June.

Medicaid

The section collected third-party Medicaid reimbursement totaling \$43,740.70 as a result of 15 case resolutions. In addition, the section prepared and submitted briefing in a declaratory judgment action challenging the state's authority and practices concerning Medicaid third-party liens and subrogation.

Other

AAG Tim Twomey represented Alaska Psychiatric Institute (API) in a multi-day commitment and medication petition hearing in superior court involving a chronically mentally ill individual. API was successful in the trial court; AAG Twomey is working to defend that result in the Alaska Supreme Court.

AAG Libby Bakalar succeeded in having two administrative hearings dismissed before the Office of Administrative Hearings. The hearings were related to substantiated findings of abuse and neglect by the Office of Children's Services.

AAG Kimberly Allen conducted her first hearing and wrote a brief to dismiss a hearing, which was granted.

In addition, three favorable hearing decisions were received in cases handled by former AAG Nevhiz Calik.

AAG Kelly Henriksen finished the preliminary review of the Medicaid coverage regulations.

Labor and State Affairs

Elections Litigation

Nick v. Division of Elections. On May 8, Judge Burgess of the federal district court denied plaintiffs' motion to accept an over-length brief and struck plaintiffs' 150-page motion for preliminary injunction from the record, allowing them to re-file, but, ordering the plaintiffs to confine their motion to the 25-page limit set out in the local rules. On May 16, all parties filed final witness lists. On May 21, the state defendants completed their expert disclosures. On May 23, the state defendants filed their reply brief on their motion for partial summary judgment that Yup'ik is a historically unwritten language. Expert and additional lay witness depositions are set for mid-June. This case challenges the adequacy of minority language assistance provided by the division of elections to Yup'ik speakers in the Bethel census area. Discovery is underway and numerous depositions have been scheduled. The plaintiffs are represented by four lawyers from the American Civil Liberties Union and the Native American Rights Fund. The state is represented by AAGs Sarah Felix and Mags Paton-Walsh.

Office of Rate Review

Bartlett Hospital Ninth Circuit Mediation. As reported last month, the parties settled this contentious appeal and the Ninth Circuit entered an order on April 23 on the parties' stipulation for dismissal without prejudice to re-filing (in the

event *vacatur* is denied). The Center for Medicare and Medicaid Services and Bartlett Hospital will file a joint motion to vacate the underlying district court decision and order with the district court by May 23. The state was not a party of the district court action, but is an intervener appellant in the Ninth Circuit appeal and will file an affidavit in support of the *vacatur*.

Bartlett Hospital Administrative Proceeding.

Bartlett's related administrative appeal was stayed in 2003 pending decision on the Ninth Circuit appeal. As a result of the settlement, the administrative proceeding has been reopened. The hearing examiner ordered briefing on how the administrative case should proceed, and scheduled oral argument for May 15. After Bartlett filed its opening brief and the state responded, but before Bartlett's reply or oral argument, the hearing examiner stayed the briefing schedule and argument pending her ruling on the cross motions for summary judgment that had been heard prior to the March 2003 formal hearing but not decided. The section is waiting for the hearing examiner's decision. AAG Linda Kesterson represents the state in both Bartlett Hospital matters.

Alaska Regional Hospital FY 2004 Administrative Appeal.

Alaska Regional Hospital appealed its Medicaid rates for FY 2004 and FY 2006; it did not file appeals for FY 2005 or FY 2007. The rates for these years are derived from FY 2002 data. Following extensive pre-hearing discovery, hearing preparation and settlement negotiations, on May 15 the parties executed a settlement agreement settling the Medicaid rates for FY 2004 - 2007. The settlement includes audit adjustments to the FY 2002 Medicare Cost Report that will increase both the Medicaid inpatient per-day rate and the percentage of charges rate paid for Medicaid outpatient services. All claims for the hospital's FY 2004, 2006, and 2007 will be reprocessed at the new rate. No claims will be reprocessed for FY 2005. The settlement also resolves a recurring depreciation issue for future rate years. This is the first Medicaid rate-setting settlement that

concludes with a complete reprocessing of claims using an adjusted rate rather than a specific dollar amount. AAG Linda Kesterson represents the state.

Department of Motor Vehicle (DMV) Cases

Work continues on several active DMV appeals. Active cases include:

Joseph Graham v. State, DOA, DMV

Jesse Drake v. State, DOA, DMV

Timothy Navarre v. State, DOA, DMV

Richard L. Dunaway v. State, DOA, DMV

John P. Kellar v. State, DOA, DMV

Daniel Poirot v. State, DOA, DMV

Sonja Alvarez v. State, DOA, DMV

Oral argument in the *Graham* appeal is scheduled for July 8 (it was rescheduled after opposing counsel became ill), and another oral argument in *Kellar* is coming up. *Graham* and *Kellar* are both superior court cases. The oral argument in the Alaska Supreme Court case, *Poirot*, has been moved from July to September upon request of opposing counsel. The state's Supreme Court brief is due in the *Alvarez* appeal in June. AAG Krista Stearns represents DMV in these cases.

Local Boundary Commission

City of Craig, et al., v. Local Boundary Commission. This is a case challenging the Local Boundary Commission's (LBC) approval of the Ketchikan Gateway Borough (KGB) annexation petition. The appellants have filed a motion to supplement the record on appeal with documents regarding former LBC staff supervisor Dan Bockhorst's ethics disclosure. Mr. Bockhorst, who had been working on a preliminary report of the KGB annexation petition, disclosed an ethics conflict when the borough manager job for the KGB was announced and he considered applying for the position. He immediately recused himself from further proceedings on the KGB annexation, which was determined to be the proper course of action.

Bockhorst was eventually selected as the new borough manager, which occurred prior to the LBC approving the KGB annexation. The appellants also seek an order from the superior court to direct public records to be searched and provided even though appellants have not paid the required fees. AAG Margie Vandor represents the Local Boundary Commission in this matter.

Office of Public Advocacy

Robinson and Associates v. Office of Public Advocacy. This case originated as a contract claim before the Office of Administrative Hearings in 2004 brought by Robinson, who claimed that the Office of Public Advocacy (OPA) had breached the contract by terminating it early. The Office of Administrative Hearings found that OPA's termination was not improper. Robinson appealed to the superior court. The superior court reversed, ruling that OPA acted in bad faith when it terminated the contract (notwithstanding language that provided for termination for convenience), and remanded to the Office of Administrative Hearings for damages. An evidentiary hearing was held in October 2007, and OPA claimed that Robinson failed to mitigate his damages. Robinson claimed nearly the full amount not paid under the remaining term of contract (a flat monthly fee contract for a certain number of criminal and civil cases), \$144,000.

In April 2008, the Office of Administrative Hearings determined in a preliminary decision that Robinson should be paid \$86,000, and that OPA had not met its burden to show that Robinson did not mitigate his damages. OPA filed a request for action with the commissioner, noting that Robinson testified he had not attempted to do anything different to obtain additional business after the contract with OPA had terminated and that he refused offers to continue cases with OPA pending a new solicitation being issued (which he did not bid on because it no longer provided for a flat fee arrangement). OPA also complained that the Office of Administrative Hearings decision did not take into account that OPA could not have acted contrary to the procurement code to

provide Robinson with advertising assistance or a special contract. A status conference is scheduled for June 3. AAG Margie Vador represents OPA in this matter.

Legislation and Regulations

The Legislation and Regulations Section spent a busy month editing bill reviews for bills passed during the regular session, and prepared for the June 3 special session called for on any action of the commissioner of natural resources and the commissioner of revenue under the Alaska Gasline Inducement Act (AGIA).

The section prepared lengthy revisor's memoranda to address Executive Order 114, transferring of habitat functions from the Department of Natural Resources to the Department of Fish and Game. A revisor's memo was also prepared to address renumbering of statutes for taxes on gaming or gambling aboard large passenger vessels.

During the month, Section Supervisor Deborah Behr participated in the Committee on Style for the National Conference of Commissioners on Uniform State Laws and attended the Annual Meeting of the American Law Institute.

Additionally, the section edited and legally approved for filing the following regulations projects: 1. Department of Fish and Game (McNeil River State Game Refuge and McNeil River State Game Sanctuary); 2. Board of Fisheries (Statewide King/Tanner Crab meeting - seabird avoidance measures in groundfish fisheries); 3. Board of Game (February and March 2008 Meeting - Interior Region; Falconry permits and special provisions in predation control areas; statewide taking and use of game - statewide cycle); 4. Department of Revenue (charitable gaming amendments); 5. Real Estate Commission (community association management; applications, instructor approval, and continuing education); 6. Board of Professional Counselors (board member absences); 7. State Board of Education and Early Development (developmental

profile; performance review standards); Department of Health and Social Services (personal care assistance and rates for home and community-based waiver services); Department of Commerce, Community, and Economic Development (mortgage lending).

Natural Resources

Estate of David Miller v. Commercial Fisheries Entry Commission. This is a superior court appeal from the Commercial Fisheries Entry Commission's (CFEC) decision to deny an application for a limited entry permit for the Chatham Straights, Northern Southeast Inside Sablefish Longline fishery. The application was submitted by the estate of a fisherman who died several months before the qualification date for the fishery. In the summer of 1985, the CFEC closed the Chatham Straights fishery, and established January 1, 1985 as the qualification date for determining qualifications for a limited entry permit. Mr. Miller was lost at sea on September 30, 1984 while assisting a vessel in distress.

His estate filed an application for a limited entry permit based on Mr. Miller's qualifications before his death. The CFEC rejected the application on the basis that the applicable statutes and regulations required the applicant to be alive on the qualification date. The estate has appealed, claiming that the CFEC's refusal to evaluate a deceased fisherman's qualifications, and a CFEC regulation that allows the CFEC to accept applications from estates of fishermen who died after the qualification date, but not before, violate equal protection and due process, and are otherwise contrary to law. The estate filed its opening brief on April 11. AAG Colleen Moore represents CFEC.

Doubleday v. Commercial Fisheries Entry Commission. On May 12, Kenai Superior Court Judge Anna Moran affirmed the Commercial Fisheries Entry Commission's (CFEC) decisions in two related appeals denying Morgan Doubleday

entry permits for the Northern and the Southern Southeast Inside Sablefish Longline Fisheries. In each case, Doubleday offered virtually no evidence of participation in the fishery during the years for which he claimed participation points.

Doubleday claimed that he was not able to provide evidence because all of his fishing records, stored in five boxes, were seized by the state pursuant to a search warrant served upon him during state and federal criminal investigations into his past fishing activities. Doubleday further claimed that repeated attempts to recover his records subsequent to his federal convictions under the Lacey Act for illegal harvest, transport, sale of halibut, and for witness intimidation were unsuccessful. According to Doubleday, the state destroyed his records, and therefore the burden of proof in these cases should shift to the state as the state had committed spoliation of evidence.

The state, however, was able to supplement the agency record in this appeal with the search warrant in question. The associated inventory of property clearly established that no records were seized upon the search of his residence. In addition, the state cited a previous district court order in which the judge ruled that there were no Doubleday fishing records in state possession.

In each of these cases, Doubleday completely failed to support his claims. In addition, the agency record indicated he was fishing for other species at other locations during the very short sablefish seasons at issue. Given these facts, the state filed motions seeking recovery of full attorney's fees in both cases, as the appeals appear to have been brought in bad faith and for the purpose of delay. Under CFEC regulations, applicants continue to be eligible for interim use permits as long as their application for an entry permit remains under appeal. AAG Tom Lenhart represented the state.

Southeast Alaska Conservation Council & Tongass Conservation Society v. State & University of Alaska. The state and University of Alaska prevailed on summary judgment in Juneau Superior Court. The plaintiffs, environmental organizations seeking to stop the conveyance of real property from the state to the university, filed a motion for injunction pending appeal. Despite having filed suit over a year ago challenging the constitutionality of the land grant legislation (which was enacted three years ago), and despite having lost in superior court, plaintiffs argued that they were entitled to emergency injunctive relief and requested an expedited briefing schedule and consideration of their motion. The court agreed to hear the injunction motion on an expedited basis. Briefing was complete on May 15, and the parties await the court's ruling. Appeals from the Juneau Superior Court's rulings on both the motion for injunctive relief and summary judgment are anticipated. AAG Anne Nelson represents the state.

State Gearing Up to Challenge Unwarranted Listing of Polar Bear

On May 14, U.S. Secretary of the Interior Dirk Kempthorne announced his unprecedented decision to list a currently healthy species as a threatened species under the Endangered Species Act (ESA) based on uncertain modeling of future climate conditions and even more uncertain speculation regarding impacts of those predicted conditions on the polar bear population. Since that time, AAGs Brad Meyen and Steven Daugherty have been working almost exclusively on polar bear issues. They reviewed the listing decision, an accompanying interim final rule regarding prohibitions relating to the polar bear, the state's prior comments on the proposed listing, and portions of the massive administrative record. They also sent Secretary Kempthorne a 60-day notice of intent to sue under the ESA.

Federal Subsistence Issues Continue

May was another busy month for federal subsistence issues. AAG Steven Daugherty assisted the Alaska Department of Fish & Game (ADF&G) by attending a three day Federal Subsistence Board wildlife regulatory meeting April 29–May 1. In addition, AAGs Steven Daugherty and Mike Sewright assisted the ADF&G in filing five new requests for reconsideration of recent fishery actions taken by the federal board, including a challenge to the board’s refusal to eliminate a federal customary and traditional use determination which provides a harvest preference for rural residents of Southeast Alaska on the Juneau road system.

Oil, Gas, and Mining

Oil and Gas Corporate Income Tax Case

Section Chief Tina Kobayashi and AAG Anne Johnson participated in a two-week administrative hearing on an oil and gas corporate income tax case. Both sides presented numerous documents as well as testimony by witnesses and experts. Details about the taxpayer and hearing are confidential by law.

State Assessment Review Board (SARB)

On May 20, AAGs Ken Diemer and Steve DeVries represented the Department of Revenue Tax Division in hearings before the State Assessment Review Board (SARB) in two property tax matters. At issue was whether the State Oil and Gas Property Assessor properly valued the North Star Wells/North Star Oil Production facility and the Trans Alaska Pipeline System (TAPS).

Both the owners of the TAPS (BP, ExxonMobil, ConocoPhillips, Unocal and Koch) and the North Slope Borough, Fairbanks North Star Borough and City of Valdez (municipalities) appealed the assessment of the TAPS to the SARB with the owners asserting that the “full and true” value

of the TAPS was no more than \$850,000,000, and the municipalities asserting that the “full and true” value of the TAPS was in the order of \$10.2 billion. The hearing was conducted over three 12-hour days, during which many witnesses were questioned by counsel for each of the parties and by the SARB members. If the Department of Revenue’s assessment is upheld, then the owners of the TAPS would owe approximately \$355,000,000 in property taxes, of which the State of Alaska would receive approximately \$88.7 million. The remainder then would be allocated amongst the municipalities and unincorporated boroughs. A decision from the SARB is expected by May 30.

AGIA (Alaska Gasline Inducement Act)

The section has worked closely with the administration during the AGIA gas pipeline process since its inception. The section provided advice during development of the AGIA legislation, the request for applications and the application evaluation process. On May 22, Governor Palin announced intent to grant a license jointly to TransCanada Alaska LLC and Foothills Pipe Lines Ltd., who had filed a joint application. The section will continue to advise the administration during the special legislative session set to convene on June 3, to consider the administration’s proposed license to TransCanada.

Opinions, Appeals and Ethics

Ethics

AAG Judy Bockmon prepared two written advisory opinions addressing post-state employment matters and completed work on a significant investigation of alleged ethics violations and submitted a report to the Personnel Board. She closed an investigation file after the reporting party failed to reply to a request for a formal complaint and additional information, and addressed two requests for conflict waivers.

AAG Bockmon continues to work on an advisory opinion for the Department of Administration regarding personal use of state-owned cell phones, blackberries, laptops and other state-owned equipment.

The new training manual for designated ethics supervisors has been distributed to the governor, commissioners and ethics supervisors. An information guide titled *Highlights of the Executive Branch Ethics Act* was prepared for review by the Alaska Workforce Investment Board members in conjunction with their May meeting.

Appeals

Pam R. v. State, Office of Children's Services.

The Alaska Supreme Court issued a decision favorable to the state. A grandmother appealed the trial court's finding that she was not the Indian custodian of her grandchildren under the Indian Child Welfare Act. The grandmother presented numerous challenges on appeal, most of which the Supreme Court disposed of on narrow, factual grounds. The opinion provides guidance on a few Indian custodian issues that are likely to recur: (1) an Indian custodianship established by a parent's transfer of "temporary physical care, custody, and control" over a child to another Indian person (one of two methods by which an Indian custodianship may be established) "logically may end when a parent returns and reassumes responsibility for the child's care, custody, and control"; (2) the Court implied that a trial court should look to the "nature, frequency, and duration of contacts" between a child and a purported Indian custodian in determining whether a parent has transferred care, custody, and control to the other person; and (3) the Court implied that a mere agreement between a parent and an Indian person that the person will raise the parent's child is not sufficient to establish an Indian custodianship when the agreement is not documented, disclosed, or demonstrably implemented before the Office of Children's Services assumes custody of the child. The Court declined to address several broader issues

relating to the establishment and implications of Indian custodianships. AAG Mike Hotchkin handled the appeal.

Tessa M. v. State, Office of Children's Services.

The Alaska Supreme Court affirmed the termination of parental rights of a mother to her child. There were two issues on appeal: (1) whether the trial court erred in concluding that the mother failed to remedy her conduct, and (2) whether the trial court erred in concluding that terminating the mother's parental rights was in the child's best interests. In relation to the first, the young child was found to be in need of aid pursuant to AS 47.10.011(6) and (8) based on severe physical abuse by the father and possibly the mother (the mother failed to protect the child from harm and/or contributed to the harm). The Supreme Court concluded that the mother failed to remedy her conduct based on her inability to recognize her child's special needs, on the mother's failure to alter her parenting style to meet those needs, and on her failure to acknowledge that her child had been abused while in her care.

In doing so, it rejected the mother's argument that the evidence should have been viewed in an objective manner rather than a subjective one (the standard applied in determining whether a parent has abandoned a child under AS 47.10.011(1)), explaining that the failure to remedy determination, "by its very nature, requires not just an evaluation of objective conduct, but also broader and more subjective considerations and judgments." In relation to the second issue, the Supreme Court affirmed the superior court's finding that it was in the child's best interests to terminate the mother's parental rights, emphasizing that the "best interests of the child, not those of the parents, are paramount." AAG Megan Webb handled the appeal.

W.S.B. v. Alaska Psychiatric Institute. AAG

Megan Webb argued an appeal before the Alaska Supreme Court on behalf of the Alaska Psychiatric Institute (API) in an involuntary commitment proceeding. The appeal involved two issues: (1)

whether the trial court erred in granting the petition for 30-day commitment based on the conclusion that the appellant was mentally ill and, as a result, was “gravely disabled”, and (2) whether the commitment order was per se invalid because the court system failed to provide the trial court with a transcript of the commitment hearing along with the master’s written findings and recommendations. API argued that there was more than sufficient evidence to support the conclusion that the appellant was gravely disabled and that the lack of a transcript was harmless, given that the trial court had access to the complete record, including the recording of the commitment hearing.

E.P. v. Alaska Psychiatric Institute. In another appeal involving the Alaska Psychiatric Institute (API), AAG David Jones filed a brief in the Alaska Supreme Court concerning the statutory requirements for the involuntary commitment of a person with mental illness. Alaska’s statutes permit the involuntary commitment of a person who, due to mental illness, is gravely disabled or likely to cause serious harm to himself or others. The brief addresses whether the statutes permit the involuntary commitment of a person likely to cause serious harm to himself, even if treatment is unlikely to improve the person’s mental condition. The appeal involves the commitment to API of a man, E.P., with brain damage and other conditions resulting from repeated huffing of various toxic substances. E.P. initially entered API voluntarily, but then wanted to leave. E.P. told his psychiatrist at API that, if released, he intended to resume huffing. The psychiatrist concluded that, because of E.P.’s brain damage and other mental illnesses, E.P. lacked the insight and judgment to appreciate the danger of continued huffing. The psychiatrist therefore petitioned the court for E.P.’s involuntary commitment. E.P. appealed to the Alaska Supreme Court three orders committing him to API involuntarily for 30, 90, and 180 days.

Ian Wallis v. State of Alaska, Department of Health and Social Services, Division of Public Assistance. The state filed its appellee brief in Alaska Supreme Court this month. The case is about what the federal food stamp laws require the Division of Public Assistance to do when it makes a mistake with federal dollars. Mr. Wallis is a food stamp recipient. The division, which administers the federal food stamp program in Alaska, made a mistake in processing Mr. Wallis’ application and as a result, paid him more in food stamp benefits than he was entitled to receive. When a state agency, like the division, makes a mistake and pays a household more benefits than it should have, federal law makes the household liable for the overpayment and requires the state agency to seek collection. Mr. Wallis sought relief from that collection under the state law doctrine of equitable estoppel. The division rejected that defense on the grounds that state law is preempted by federal law. The superior court agreed. In the appeal to the Supreme Court, the division continues to argue that because the state and federal law are in conflict, the state law defense must yield. AAG Laura Bottger represents the division before the Alaska Supreme Court.

Regulatory Affairs and Public Advocacy (RAPA)

Pre-Filed Testimonies

U-07-134, North Slope Borough Refuse. In compliance with a prior RCA order, the North Slope Borough (NSB) filed a rate case in August 2007 reflecting a \$1 million revenue requirement deficiency for its commercial refuse collection services in the Prudhoe Bay oilfield service area. The proposed rate increases varied from 150 percent for scheduled, basic small-bin pick-up service to 11 percent for unscheduled large-bin pickup. In response to RCA invitation, the attorney general/RAPA filed a notice of election to participate in the docket on October 15, 2007.

On May 9, the attorney general/RAPA pre-filed the direct testimony of staff expert witness, Parker J. Nation, Jr. Among other things, his testimony recommends adjustments to the tipping fee charged the utility by NSB's landfill affiliate and to the rates for various categories of service. Also, his testimony proposes an operating ratio methodology to compute rate of return. Overall, the attorney general/RAPA recommends approximately \$1 million in adjustments to the utility's filed revenue requirement. An adjudicatory hearing is scheduled for July 29, 2008. AAG Glenn Gustafson is litigation counsel.

U-07-78, Goat Lake Hydro. Goat Lake Hydro, Inc. (GLH) is a wholesale producer of hydroelectric power near Skagway that sells all of its power to its regulated affiliate, Alaska Power Company (APC). On May 18, 2007, GLH filed a proposed kWh rate increase to 'true-up' its rate stabilization account previously approved by the RCA. Inside Passage Electric Cooperative, Inc., a wholesale customer of APC (the GLH affiliate) was granted intervention in the docket on July 24, 2007. In response to RCA invitation, the attorney general/RAPA elected to participate on October 31, 2007.

On May 12, the attorney general/RAPA pre-filed the direct testimony of staff expert witness, Janet K. Fairchild. Among other things, her testimony challenges GLH's filed 12 percent return on equity and recommends 7 percent, and adjusts for the interest arbitrage calculation. As a result, attorney general testimony concludes that the proposed kWh rate increase should be rejected as unnecessary because GLH is presently on track to achieve a zero balance in its rate stabilization account. An adjudicatory hearing is scheduled for July 19, 2008. AAG Sam Cason is litigation counsel.

New Case

U-08-58, Enstar Gas Contracts. On April 14, 2008, Enstar Natural Gas Co. (Enstar) filed before the RCA two proposed Gas Supply Agreements (GSAs) for natural gas supply from

2009-2013 to meet its unmet needs: one with Marathon Oil Co. (MOC) for 25.6 Bcf, and one with ConocoPhillips (CP) for 12 Bcf. Each of the two proposed GSAs are premised upon a median price index resulting from their individual market basket of respective (geographic) price points. The GSA's are a matter of first impression because the proposals involve multiple providers of gas, short-term contracts, and tiered pricing based upon a market basket floor index to value different gas delivery levels.

Enstar's gas costs are passed through directly to its ratepayers. If approved, the subject GSAs would be the second largest source of gas to Enstar beginning in 2009. Consequently, the price of that gas supply will have substantial impact upon consumer prices in the Railbelt. Enstar has requested a decision from the RCA by October 31, 2008 in order to implement (approved) contracts by January 2009.

Section Chief Daniel Patrick O'Tierney filed extensive attorney general/RAPA Comments on May 12 that questioned numerous aspects of the proposed contracts and called for further investigation of them. In response to RCA request, the attorney general/RAPA filed notice of election to participate as a party in the docket on May 21. The commission's procedural order directs that Enstar will pre-file its direct testimony on May 28; the attorney general/RAPA and other intervenors will pre-file responsive testimony on June 24, with an adjudicatory hearing scheduled to begin on July 28. The attorney general/RAPA has contracted for expert witness/consulting services with economist C.M. Klein. Attorney general/RAPA litigation counsel is Sr. AAG Steve DeVries.

Torts and Workers' Compensation

On May 16, the Alaska Supreme Court issued its opinion in *Maness v. Daily et al.*, an excessive force case. Alaska State Troopers attempted to take Maness into custody pursuant to an emergency order for custody issued by the

superior court judge. Maness armed himself and fled from the troopers prompting a manhunt by the troopers and the Anchorage Police Department. Maness was shot while being apprehended. He was convicted of felon in possession (a federal weapons charge). At his criminal sentencing, the judge found that Maness threatened the police officers with a weapon at the moment he was shot. Maness filed an excessive force case in state court; he also sued a state court judge. The trial court dismissed the case. It found that the judge was protected by judicial immunity. It also found that Maness was collaterally estopped from challenging the facts determined at his criminal sentencing because state law does not allow a plaintiff to recover for personal injuries substantially related to the plaintiff's commission of a felony. AAG Ruth Botstein represented the Alaska State Troopers and the superior court judge named in the suit.

The issue addressed on appeal was whether a judge's findings at a sentencing proceeding can be used as binding in subsequent civil litigation. The Alaska Supreme Court reversed, finding that collateral estoppel did not apply in this situation and that Maness should be allowed to litigate his force claim on remand. Additional motion practice is expected on remand.

Walter J. Kurka (pro se) filed a lawsuit in superior court against Judge Harold Brown, five Alaska Supreme Court Justices, a state custody investigator, and the state custody investigator's office. Mr. Kurka raised a number of constitutional and tort claims, including allegations that the defendants conspired to deny him his due process rights relating to a child custody decision. Superior Court Judge Anna Moran granted the state's motions to dismiss all parties (with prejudice) on the basis of absolute judicial and quasi-judicial immunity. The case was successfully defended by AAG Janell Hafner.

CRIMINAL DIVISION

Anchorage DAO

Anchorage conducted 12 trials and 83 grand juries this month.

ADA Andrew Grannik conducted a hand-off trial against Roy Helveston, a revolving-door thief and burglar. Helveston's co-defendant and a jailhouse snitch testified for the state. The snitch was the only link between Helveston and the burglary. The jury convicted on all counts.

ADA John Skidmore secured the conviction of Trevor Stefano in a drug-deal-gone-bad murder two trial. ADA Skidmore closed out with a nice piece of evidence – a jailhouse recording of Stefano talking to his girlfriend about lying for him in court.

ADA Brittany Dunlop convicted Ron Heskett of felony theft by receiving for his role as the driver of the vehicle from which a co-defendant attempted to pawn a unique concrete saw. The main issue became value. The public defender, using \$400 in state funds, purchased a comparable saw at another pawnshop. She introduced the pawn receipt with her name on it. The original pawn shop price was \$600. Construction workers in the industry testified that it would cost \$600-1,000 to replace the saw. Thinking quickly, ADA Dunlop called a theft detective and had the detective testify that, when looking for stolen property, the first place to look would be pawn shops because they sell lots of stolen (and therefore under-priced/under-undervalued) property. The jury agreed that the proffered pawnshop transaction did not set the market value. The court denied ADA Dunlop's request to cross-examine the public defender, but then allowed ADA Dunlop to argue that the public defender had a motive to get the price under the \$500 value limit for theft two.

ADA Dan Shorey tried Adam Milazzo for murder two based on a DUI homicide. Milazzo was not tried under an “extreme indifference” theory but a “substantially certain to cause death or serious physical injury” theory. If you have a similar situation, ask ADA Shorey about the jury’s interesting approach to calculating the “substantially certain” outcome of Milazzo’s conduct.

ADA John Darnall convicted Seyran Andreysan for a series of crimes. During a routine traffic stop for tampering with a registration tag (handwriting an “eight” in Sharpie marker over the five in 2005, strike 1), police found that Mr. Andreysan did not have a current operator’s license (strike 2). As Andreysan ran from police (strike 3) he started flinging property, including some meth (strike 4) and eventually a gun (strike 5). The police found the drugs, but not the gun. Based on the testimony of the officer and three separate citizens who saw the gun being waved during the foot pursuit (and then took cover themselves – strikes 6, 7, 8), the jury convicted Andreysan for being a felon in possession, misconduct involving a controlled substance in the fourth degree, and reckless endangerment.

Fairbanks DAO

A 65-year old Fairbanks man was sentenced to 131 years in prison for murder and attempted murder. In January the defendant pled no-contest to murder and attempted murder in exchange for the state dismissing six other pending felony charges. This defendant was on third-party release in February 2007 for 16 counts of child pornography out of Homer when he shot and killed his third-party custodian and shot and wounded the custodian’s mother, both North Pole residents. It is believed that the third-party custodian, a local gold miner and school bus driver, was making plans to turn the defendant back into jail when he was shot in a misguided attempt by the defendant to avoid going back to jail. The defendant, who was

sentenced to 99 years for the murder and 32 consecutive years for the attempted murder, will not be eligible for parole until he turns 106-years-old.

When driving to a friend’s apartment after a night of drinking, a 26-year-old North Pole man struck a 53-year-old native woman lying in the middle of the road and drug her the remaining several blocks to his friend’s apartment. On the following cold morning in February 2007 passersby found the woman’s frozen feet sticking out from under the defendant’s car. The defense focused the October 2007 trial on the fact that the woman’s blood alcohol content had been measured post mortem at .229 percent and argued that the woman was either already dead or certainly dying of hypothermia in the 30 below temperatures when the defendant’s car struck her. The jury convicted the defendant of manslaughter and driving under the influence. Sentencing was set for February 2008. However, his sentencing was delayed when the matter was referred to a three judge panel when the defense argued that the presumptive sentence was unfair given the defendant’s remarkable potential for rehabilitation.

The three judge panel found that the defendant did have a remarkable rehabilitative prospect, but that the presumptive sentencing range of 7 to 11 years was not unfair given the totality of the circumstances and sent the case back to the superior court for sentencing. The trial judge then sentenced the man to seven years in prison for the manslaughter conviction and another year with 10 months suspended for the DWI.

After hearing the victim’s testimony in a case alleging 32 counts of sexual abuse of a minor in the first degree, the April grand jury directed the ADA prosecuting the case to add 62 additional counts. The 47-year-old defendant is now facing 94 counts of sexual abuse of a minor in the first degree, a conviction on any one of which could subject him to a presumptive sentence of 25 to 35 years in prison, as the victim was less than 13-years of age. The defendant is being held in jail with bail set at

\$125,000 plus the requirement of a court approved third-party custodian pending a July trial date.

Juneau DAO

May was quiet for Juneau as the office gears up for a busy June trial calendar, including the trial of the continuing criminal enterprise cases of Aaron Washington and Vonnie Williams. Washington and Williams are charged with misconduct involving a controlled substance in the first degree, and numerous counts of misconduct involving a controlled substance in the third degree, for running a large cocaine importation business in Juneau.

Darren Jacksch was sentenced to 20 years with 12 years suspended after pleading guilty to sexually abusing two teenage boys. Mr. Jacksch, who lives in Ketchikan, was charged by the grand jury of two counts of sexual abuse of a minor in the first degree and five counts of sexual abuse of a minor in the second degree. The initial victim reported the incident after he returned home to Fairbanks from a church camp in Juneau. The incident occurred at the camp where Mr. Jacksch was one of the adult chaperones. After reading of Mr. Jacksch's arrest, a second victim, who now lives in Juneau, came forward to report that he had been abused by Mr. Jacksch in Ketchikan in 2004. At the time of his arrest, Mr. Jacksch was employed by the Ketchikan Charter School.

After several delays in the scheduling of a restitution hearing, Robert Huber was ordered to pay over \$4 million in restitution for the destruction of the Holy Trinity Episcopal Church and a private residence in a 2006 Juneau fire. Mr. Huber started the fire after being kicked out a party in a residence near the church. Firefighters who responded to the blaze were unable to save either building, but were able to contain the fire and keep it from spreading any further through downtown Juneau.

The office has seen an increase in the number of persons with out of state warrants being arrested in the Juneau area. Several of them have been passengers on cruise ships and were arrested in conjunction with officers from Immigration and Customs Enforcement.

Kenai DAO

Trials

The Kenai DAO had trouble concluding trials this month in both Kenai and Homer. In Kenai, ADA Scot Leaders was prosecuting a third-party custodian who failed to report the absence of the defendant. That defendant, a well-known local drug dealer, was unlucky enough to be attempting to rent a house from a police officer who recognized her immediately. Unfortunately for her, she did not recognize him. The trial was aborted when the defense attorney announced that she was going to call the person for whom her client was the third party, without regard for the witness' fifth amendment rights. Fortunately ADA Leaders was able to anticipate this and prevented the jury from being sworn.

In the trial in Homer, ADA Kelly Lawson got a hung jury on a drug DUI. The defendant had a "cocktail" of five drugs in his system, including methamphetamine, THC, and Ecstasy. Unfortunately, there was no impaired driving. The Washington Lab expert was unable to tell the jury how impaired the driver was and unable to relate back the values at the time of driving.

Sentencings

The offices were very successful in prosecutions of felony failure to register as a sex offender cases. One defendant with a very lengthy criminal history pled to a flat five year sentence in exchange for the DAO to decline a felony theft case. Another pled to a flat three year sentence. The defendant from ADA Angela Jamieson's trial from a few months ago was sentenced to four years to serve with one year

suspended after a very heated sentencing hearing. ADA Jamieson had an officer and an investigator testify about the defendant's ongoing contacts with minors and the danger he presents to the community.

One sentencing was very disappointing. The defendant was convicted at trial of sexual abuse of a minor in the first degree, sexual assault in the first degree, and assault in the first degree. The victim was the two-year-old daughter of the defendant's girlfriend. He had assumed the role of "daddy" and babysat her during the day while her mother worked. After the verdicts were returned, the defendant stipulated to three aggravators and the state agreed that the sexual assault and sexual abuse charges merged; the assault, however, was a separate incident on the same day. The baby was hospitalized as a result of the attacks and required internal surgery to repair her injuries. The surgeon likened it to surgery following child birth. The judge sentenced the defendant to 18 years in jail with three years suspended on the sexual abuse of a minor in the first degree and ten years with two suspended on the assault in the first degree with four years concurrent with the sexual abuse against a minor in the first degree. The judge then went on to explain to the defendant that the sentence wouldn't be as long as the 19 years to which she had sentenced him because he would get good time; she even approximated it for him. There was an article in the local newspaper the day following the sentencing and the community has been posting numerous comments on the website demonstrating their disapproval.

Grand Jury

The grand jury had some unusual weeks this month. April started with them indicting a defendant on 100 counts of child pornography. During a follow-up investigation of potential witness tampering charges, the police obtained new warrants and discovered previously hidden videos and photographs resulting in May starting with the grand jury returning additional counts of

possession of child pornography, as well as counts of tampering with evidence and solicitation to commit tampering with evidence.

The grand jury heard numerous drug cases including a 500-plant marijuana grow, as well as more Whizzinator and Urinator type cases, although this month's involved more homemade devices with hand-warmers to maintain the optimum temperature. And all the defendants professed to purchasing the needed synthetic urine from one local merchant.

One week the grand jury heard four cases, all felony DUIs. In the last case of the day, the defendant was stopped at 3 a.m., arrested at 4 a.m., remanded to jail at 5 a.m., indicted by 10:30 a.m., and appeared at arraignment at 2 p.m.

Kodiak DAO

As the long days turn toward summer in Kodiak, business remains constant. Early in the month, Judge Stowers sentenced a Kodiak man to seven years with two suspended following his conviction of assault in the second degree. The defendant beat the victim in the face with his fist as the victim slept. The sentencing hearing lasted six hours.

Business before the Kodiak grand jury remains steady as summer begins.

ADA Brent Williams was involved in a seven hour suppression motion hearing before the magistrate.

Several persons were indicted during the month, including a Kodiak man who pointed a shotgun at two women. The women were friends of the defendant's girlfriend and followed the couple after witnessing their friend being handled roughly.

A Port Lyons man was sentenced before Judge Suddock in Anchorage for assault in the third degree and escape after brandishing a knife at his former partner. The defendant had been

on release for a prior assault during which he had escaped from custody.

The Kodiak jail has been consistently full and state troopers have been kept busy throughout the month just due to the need for prisoner transports.

At the end of the month, Kodiak enjoyed unprecedented sunshine during the local five day Crab Festival. The offices look forward to the green days of summer. The population of the island is entering the seasonal peak as commercial fishermen and tourists come to the island.

Kotzebue DAO

In May, ADA Paul Roetman was rewarded for his hard work with two good jury verdicts. Roy Adams was convicted of first degree sexual assault. Johnson Stalker III was convicted of escape plus six misdemeanors ranging from fourth degree assault to violating conditions of release.

Nome DAO

ADA Bob Collins accomplished good sentencing results for Andy Penayah. Penayah was convicted of several felonies after holding family members at gunpoint in Savoonga. He received a composite sentence of seven years with three suspended. While the case was pending, the Savoonga city council issued a letter stating that Penayah was not welcome to return to the village. Judge Esch restricted Penayah's return until he completed alcohol treatment.

Palmer DAO

Michael Phillips was finally convicted of sexual assault in the first degree and assault in the first and second degrees after four weeks, three trips to the court of appeals, a request to seal

the verdict until after the appellate court had ruled, and numerous requests for mistrials and objections to every piece of evidence asked to be entered by the state. Phillips met the victim in a bar in Cordova when he was in town for work. They left the bar together and 15 minutes later were found in an alley. The victim, as it was later diagnosed, had bi-orbital fractures and an internal laceration. DNA results showed none of the victim's blood or DNA on the defendant or anywhere on his clothing except for a small drop of blood and tissue matter on his boot. The victim had no memory of the event. At trial, Phillips denied any sex and claimed that the victim, being very intoxicated, fell on the steep slopes of Cordova. Defense also argued that the state could not prove the sexual assault charge because no one knew what happened and there was no way to connect Phillips to the injury. After one day of deliberations the jury convicted him. He faces 25-35 years on the sexual assault and 5-8 years on the assault. ADA Rachel Gernat prosecuted the case.

On May 23 Judge Beverly Cutler sentenced Todd D. Crist to a total of 32 years with seven years suspended for the rape and assault of his girlfriend. In October he was convicted by a jury of sexual assault in the first degree, assault in the third degree and assault in the fourth degree for an incident where he held his girlfriend captive in their loft for four to five hours, threatened to kill her and raped her. In an interview with Alaska State Troopers investigators he admitted to scaring her, but didn't think he did anything wrong. He admitted to having sex with her, but said it was a parting act and not rape. In his allocution he maintained his innocence and blamed the "failed relationship" on the victim. Judge Cutler declined to aggravate the sentence above the 30 year presumptive term despite the jury finding the domestic violence aggravator. ADA Rachel Gernat was the prosecutor.

On May 16 after nearly two days of deliberation, a Palmer jury found defendant, Brian Garnett, guilty of resisting arrest and driving with a revoked license, but were unable to reach

decisions on the felony driving under the influence and refusal counts. The case shall be retried. The prosecutor is ADA Michael Walsh.

On May 21, a Palmer jury took 42 minutes to find William B. Hamilton guilty of felony driving under the influence and driving with a revoked license. The defendant has a lengthy criminal history, including prior felony convictions. He has not had a valid driver's license since 1985. Sentencing is scheduled for August. ADA Rick Allen handled this case for the state.

On May 27, the state began jury selection in a marijuana grow case, *State v. Sven Rofkar*. The defendant is double presumptive and anticipated to argue that the nearly four pounds of marijuana belonged to his sister. ADA Suzanne Powell is the prosecutor for this case.

On May 8, 20-year-old defendant Kendra Butts, pled guilty to a single class A felony count consolidating eight counts of robbery in the first degree for her role as the getaway driver in the "Trick Or Treat" robbery of the children in Talkeetna. She also admitted multiple victim and vulnerable victim aggravating factors. The plea agreement requires the judge to sentence her within the 7 to 11 year presumptive range on time to serve for the robbery with a firearm. She is prohibited from arguing for any mitigating factors. She also provided a proffer interview and will testify against the presumptive felon co-defendants in a case involving eight residential burglaries. The burglary case was discovered after the investigating officer applied for search warrants of the conversations from Mat-Su Pretrial facility between the co-defendants. Amber Martin, the other female robber, is scheduled for change of plea on May 29 under a similar Rule 11 offer. The prosecutor is ADA Suzanne Powell.

During the month, the Palmer grand juries indicted 52 new felony cases, including 14 felony driving under the influence cases.

On May 1, Robert Ball and Deborah McMahon were indicted on multiple counts, including misconduct involving a controlled substance in the second degree following an investigation by the

Mat-Su Drug Unit. Fed-Ex employees contacted the police after receiving a suspicious package. The Mat-Su Drug Unit responded and after finding heroin in the package, investigators resealed the package and confronted the woman who attempted to claim the package. The woman led investigators to Robert Ball who admitted to trafficking heroin from the state of Washington through the mail. The package contained 99.6 grams of heroin. ADA Kerry Corliss handled this case.

Office of Special Prosecutions and Appeals (OSPA)

Special Prosecution Unit

Commercial fisherman Eric Osborne was convicted of fishing during a closed period. The case was investigated by Alaska State Troopers who received a report that unidentified crab fishermen were leaving pots actively fishing during the three day closure between the local access only fishery and the general opener. This was a very difficult case to investigate given that the commercial fishing grounds were located in Norton Sound which is southeast of Nome. Once troopers reached the fishing grounds, they discovered that Osborne left all 40 of his pots actively fishing during the 2007 closure. Upon interviewing Osborne's deckhands, troopers learned that he had done the same thing during the 2006 and 2005 seasons. The state seized Osborne's vessel and all 40 of his crab pots. Mr. Osborne was sentenced to 20 days in jail, all suspended, \$15,000 in fines with \$5,000 suspended, four years of probation, one year suspension of his commercial fishing permit for one year, partly retroactive (July 2007 – June 2008). Additionally, he paid \$25,000 to buy back his boat and gear, both of which were forfeited to the state. The penalty was significant for a commercial fisherman with no prior history of violations, but the goal of this case was general deterrence given the difficulty troopers face in investigating this type of violation.

SAVE THE DATE

National Association of Attorneys General
Summer Meeting
Providence, RI - June 17-19, 2008

Conference of Western Attorneys General
Annual Conference
Seattle, WA - August 3-6, 2008